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No. 91-455

In the Supreme Court of the United States

OCTOBER TERM, 1991

THE CRUDE COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DENNIS G. LINDER
ROBERT S. GREENSPAN
THOMAS W. MILLET
JOSEPH W. LOBUE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DON W. CROCKETT
Director
Judicial Litigation Division
Economic Regulatory Administration
Department of Energy
Washington, D.C. 20585

QUESTION PRESENTED

Whether the Temporary Emergency Court of Appeals correctly held that petitioner must exhaust its administrative remedies before the court will consider constitutional challenges which presuppose the outcome of the administrative proceeding.

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OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 1a-8a) is reported at 943 F.2d 59. The opinion of the district court (Pet. App. 9a-19a), not officially reported, is unofficially reported at 4 Energy Mgmt. (CCH) ¶ 26,644.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1991. A petition for rehearing was denied on August 20, 1991. Pet. App. 21a. The petition for a writ of certiorari was filed on September 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the

Economic Stabilization Act of 1970,[1] as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1) (1982).

STATEMENT

1. Petitioner is a company that was engaged in the business of reselling crude oil and refined petroleum products. On December 15, 1986, the Department of Energy (DOE) issued a proposed remedial order (PRO) to petitioner and another firm, Southwestern Refining Company, Inc. (SRCI). The PRO alleged that petitioner and SRCI unlawfully obtained "small refiner bias" entitlements in violation of DOE's oil price and allocation regulations in early 1977.[2] TECA Stipulated Record (SR) 138.

According to the PRO, petitioner entered into a sham agreement with SRCI in 1977 providing for SRCI to process 613,270 barrels of crude oil into refined petroleum products. Although SRCI neither processed the oil itself nor exercised any control over the oil, SRCI, pursuant to its agreement with petitioner, reported to DOE that the oil was processed for its account. SR 138. Under this scheme, SRCI was

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[1] Pub. L. No. 91-379, 84 Stat. 799, as amended by Pub. L. No. 92-210, 85 Stat. 743 (12 U.S.C. 1904 note (1976)).

[2] Under DOE's regulations each oil refiner was allocated a number of "entitlements" established by a regulatory formula. The formula was designed to ensure that individual refiners obtained a proportionate share of domestically produced oil that was subject to price controls. The regulations also authorized the allocation of additional small refiner bias entitlements for small refiners to compensate for their proportionately higher operating costs as compared to larger refiners. See generally *Thriftway* v. *DOE*, 920 F.2d 23 (Temp. Emer. Ct. App. 1990).

able improperly to obtain small refiner bias entitlements which it then turned over to petitioner to sell. Pet. App. 3a, 12a.

The PRO, as amended on June 30, 1989, alleged that petitioner was an "animating force" in the filing of erroneous monthly refiner reports by SRCI, and, as such, was liable for violating DOE's oil price and allocation regulations. In the alternative, the PRO alleged that petitioner had circumvented the small refiner bias regulations in violation of 10 C.F.R. 205.202. SR 149.

2. Petitioner filed this action in the United States District Court for the District of Columbia asking that court to certify to TECA petitioner's claims that: (a) DOE's "animating force" theory was based upon common law principles of tort and agency law that could only be adjudicated by an Article III court; and (b) the relief sought by DOE was "legal" rather than "equitable," thus entitling petitioner to a jury trial under the Seventh Amendment. The district court determined that petitioner's constitutional claims were premature, and dismissed the case because petitioner had failed to exhaust its administrative remedies. Pet. App. 9a-19a.

3. The Temporary Emergency Court of Appeals affirmed, concluding that petitioner's constitutional claims are not ripe for judicial review and that any ruling on the merits of those claims must await exhaustion of the administrative process. Pet. App. 4a. The court of appeals reasoned that it would "undermine the very purpose of the administrative process" if the court intervened before DOE had made an initial determination concerning whether petitioner had violated DOE regulations:

> Although appellant contends that DOE is attempting to hold it liable on a common law theory not authorized by the regulations, the DOE asserts that it is only proceeding on the theory that appellant directly violated the mandatory petroleum price regulation. At this point, we can only speculate as to whether appellant will ultimately be found liable by [DOE's Office of Hearings and Appeals] and, if so, upon what basis. It would be unwise, if not impossible, to determine the merits of a controversy that has not yet crystallized and that may in fact be resolved through the administrative process.

Id. at 6a (footnote omitted). The court further noted that its decision to require exhaustion was consistent with the "fundamental principle of constitutional adjudication that courts should reach constitutional issues only when they cannot avoid doing so." Pet. App. 7a.

The court of appeals also rejected petitioner's contention that exhaustion would be futile. The court explained that petitioner "may prevail within the agency on its argument that its conduct did not violate the regulation," and is free to "assert in the administrative proceeding the argument that [it] was not subject to the regulations in question." Pet. App. 7a.

Finally, the court of appeals determined that it was unnecessary to reach petitioner's contention that the district court lacked authority under Section 211(c) of the Economic Stabilization Act of 1970 to dismiss constitutional challenges for failure to exhaust administrative remedies. The court of appeals reasoned that "[e]ven if the district court was without authority under that statute to consider the exhaustion doctrine, this court undoubtedly has the authority

to do so." Pet. App. 4a. Since the court of appeals had determined that petitioner's claims were not ripe for review and that exhaustion was required prior to judicial review, any error by the district court in refusing to certify petitioner's constitutional claims to the court of appeals was deemed "harmless." *Ibid.*

ARGUMENT

1. The court of appeals' decision is fully consistent with prior decisions of this Court applying the doctrine of exhaustion of administrative remedies to constitutional claims that are presumptively beyond the competence of the agency to decide. As this Court explained in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938), in dismissing a claim under the Commerce Clause, exhaustion has repeatedly been required in cases where "the contention is made that the administrative body lacked power over the subject matter." The effect of allowing petitioner to bypass the prescribed administrative procedure here "would be that important and difficult constitutional issues would be decided devoid of factual context and before it was clear that appellants were covered by the Act." *DuBois Clubs* v. *Clark*, 389 U.S. 309, 312 (1967) (per curiam) (dismissing First Amendment challenge to the Internal Security Act for failure to exhaust administrative remedies). Indeed, this Court has specifically declined to decide a Seventh Amendment claim analogous to that advanced by petitioner here pending exhaustion of administrative remedies. *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 553 & n.22 (1954) (proceedings to enforce wage stabilization provisions of Defense Production Act of 1950).

Nor does petitioner's contention that it was not subject to the regulations in question and therefore

could not have violated them excuse it from exhausting its administrative remedies. "[T]he rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. at 51. See also *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). As both courts below noted (Pet. App. 6a, 17a-18a), petitioner's claim that it was not subject to the regulations has not yet been adjudicated in the administrative process. Until that adjudication occurs, petitioner's constitutional claim is at best speculative and exhaustion of administrative remedies is required.

2. There is no inter-circuit conflict that warrants further review in this case. See Pet. 10-14. None of the cases relied upon by petitioner are inconsistent with the court of appeals' decision in this case.

First, the unique factors cited by the courts in the cases relied upon by petitioner for excusing exhaustion are simply not present in this case. In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court determined that the plaintiffs' constitutional claim was "entirely collateral to his substantive claim of entitlement" and that the plaintiff would be irreparably harmed by deferring review. *Id.* at 330-331. Similarly, in *Andrade* v. *Lauer*, 729 F.2d 1475, 1492 (D.C. Cir. 1984), the court relied heavily on the fact that there was an "almost complete divergence" between the plaintiffs' constitutional and nonconstitutional claims. In the other two cases upon which petitioner relies, the courts determined that there was no possibility of the constitutional claims becoming moot if exhaustion was required. *Weyerhaeuser Co.* v. *Marshall*, 592 F.2d 373, 376-377 (7th Cir. 1979); *Finnerty* v. *Cowen*, 508 F.2d 979, 982 (2d Cir. 1974).

In contrast, the court of appeals here concluded that petitioner's constitutional arguments "presuppose the factual and legal basis of a DOE determination that has yet to be made." Pet. App. 7a. Consequently, the court deemed the record "too inadequate" to resolve petitioner's constitutional claims, because the agency has made "no ruling as to the manner in which [petitioner] may have violated the regulations nor has it determined an appropriate remedy for the alleged violation." *Ibid.* The court's concern with premature and potentially unnecessary adjudication of constitutional claims is consistent with the "fundamental rule of judicial restraint" that the courts "will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138, 157 (1984).

Second, this Court has repeatedly emphasized that the "doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *McKart* v. *United States*, 395 U.S. 185, 193 (1969). None of the cases relied upon by petitioner involved the administrative scheme established by Congress in Section 503 of the Department of Energy Organization Act, 42 U.S.C. 7193, for review of alleged violations of the EPAA. Of particular significance is the fact that the statute requires the Federal Energy Regulatory Commission, upon notice of a challenge to a Remedial Order, to "stay the effect of the remedial order, unless the Commission finds the public interest requires immediate compliance with such remedial order." 42 U.S.C. 7193(c). That procedural protection was not available to the plaintiffs in any of the cases relied upon by petitioner, and precludes any potential claim of irreparable harm.

3. The court of appeals' decision requiring exhaustion of petitioner's administrative remedies is fully consistent with Section 211(c) of the Economic Stabilization Act. Pet. 14-17. Section 211(c) provides that, upon certification of a substantial constitutional issue, "the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition." As the court of appeals found, nothing in the statute suggests that Congress intended to override the exhaustion doctrine. Pet. App. 5a-6a. To the contrary, the statute confers broad discretion upon TECA in deciding upon an appropriate disposition of petitioner's constitutional claims and expressly authorizes the court to remand the action to the district court for further disposition. Consequently, even if the district court had granted petitioner the relief it sought in that court (*i.e.*, certification of its constitutional claims to TECA), the result in this case would be unaltered, since TECA has already decided that the case should be remanded to DOE before the constitutional claims can be reached. Petitioner's arguments concerning the scope of the district court's authority therefore have little relevance at this stage of the proceedings.[3]

[3] Moreover, Section 211(c) required the district court to certify petitioner's claims to TECA only if the district court determined that those claims were "substantial." Nothing in the statute suggests that the district court must make that determination basely purely on a theoretical analysis of the claims divorced from the factual and procedural context in which the claims are presented. To the contrary, a decision that a claim is "substantial" necessarily encompasses a determination that the claim satisfies basic jurisdictional pre-

4. Though this Court need not reach petitioner's claims under either Article III or the Seventh Amendment, the claims themselves are neither novel nor substantial, and do not warrant review by this Court. Pet. 17-20. As petitioner acknowledges, it is well established that Article III does not bar Congress from assigning the adjudication of "public rights" to an administrative tribunal. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); *Northern Pipe Line Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 67 (1982) (plurality opinion). Even a "seemingly 'private' right" may be "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 594 (1985).

Similarly, this Court has recently reiterated that "if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 53-54 (1989). Therefore, petitioner's claim under the Seventh Amendment, like its Article III claim, turns

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requisites for consideration by the courts, such as ripeness and exhaustion. Petitioner's claims here are insubstantial, in part, because they are premature. Specifically, they "presuppose" the legal and factual basis for a finding of liability by DOE which has not yet been made, as well as the nature of a remedy which has not yet been imposed. Pet. App. 7a.

In any event, given the advent of decontrol over ten years ago, Exec. Order No. 12,287, 3 C.F.R. 124 (1982), and the consequent decline in enforcement activity over time, questions concerning the procedure to be followed in administering the oil price control regulations are likely to have steadily decreasing importance in the future.

upon whether an action by DOE to enforce regulations implementing the EPAA seeks to vindicate a "public right," or alternatively, whether the claims are "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution." [4]

DOE's action here to recover the value of excessive "small refiner bias" entitlements clearly satisfies these criteria. Through the EPAA, Congress authorized oil price and allocation regulations to address widespread shortages of crude oil and refined products which had created or would create "severe economic dislocations and hardships" that would "jeopardize the normal flow of commerce and constitute a national energy crisis." 15 U.S.C. 751(a) (1982). As part of this regulatory scheme, the EPAA explicitly authorized the President to require adjustments in allocations of crude oil to accomplish the objectives of the Act and "to prevent any person from taking any action which would be inconsistent with such objectives." 15 U.S.C. 753(c)(3) (1982). The authority granted by the EPAA was to be "exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy." 15 U.S.C. 751(b) (1982). The remedies granted to the government to enforce

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[4] In that regard, the Temporary Emergency Court of Appeals has consistently held that actions by DOE to enforce the EPAA " 'are taken to enforce public, not private, rights.' " *Cities Service Co.* v. *Department of Energy*, 715 F.2d 572, 573-574 (Temp. Emer. Ct. App. 1983), quoting *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982); *Van Vranken* v. *United States Dep't of Energy*, 882 F.2d 514, 517 (Temp. Emer. Ct. App. 1989); *Bulzan* v. *Atlantic Richfield Co.*, 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980).

the statute were thus an integral part of the scheme created by Congress for regulation of crude oil.

In the Department of Energy Organization Act, Congress explicitly authorized the Secretary of Energy to issue remedial orders to enforce the EPAA and established procedures for administrative review by the Federal Energy Regulatory Commission, followed by judicial review. 42 U.S.C. 7193. In so doing, Congress indisputably assigned the adjudication of the claims pending against petitioner to an administrative tribunal, subject to limited judicial review. Since those claims are integrally related to the regulatory scheme established by the EPAA, petitioner's contention that Congress exceeded its authority is without substance and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DENNIS G. LINDER
ROBERT S. GREENSPAN
THOMAS W. MILLET
JOSEPH W. LOBUE
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